

State of Colorado



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DPA

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& Administration

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Meeting Minutes June 21, 2005

The State Personnel Board met in public session on Tuesday, June 21, 2005, at the Colorado Department of Transportation, 4201 East Arkansas, Second Floor Auditorium, Denver, Colorado 80222.

The meeting was called to order at approximately 10:30 a.m. Board members Linda Siderius and John Zakhem were present in person. The following Board member was present via teleconferencing: Elizabeth Salkind. Board members Troy Eid and Diedra Garcia were absent.

Richard Djokic, Board Director; First Assistant Attorney General Richard Forman, Board Counsel; and Jane Sprague, General Professional III, were present in person.

I. REQUESTS FOR RESIDENCY WAIVERS

A. June 1, 2005 Report on Residency Waivers

The Director reported that the Request for Residency Waiver, State Personnel Board case number 2005R008 from the Department of Corrections had been granted for Health Care Services, Nurses I through VI, Physician II and Mid-Level Providers, Health Professional VI and VII, Dentist, and Diagnostic Procedures Technician.

II. PENDING MATTERS

There were no pending matters before the State Personnel Board this month.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD

- A. John J. Deelman v. Department of Education, Colorado School for the Deaf and the Blind, State Personnel Board case number 2005B020.

Ms. Siderius declared a conflict in this matter, leaving only two Board members eligible to consider the case and vote. Therefore, the matter was tabled until the next meeting.

- B. David Teigen v. Department of Corrections, State Personnel Board case number 2003B127.

Ms. Salkind moved to adopt the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge and to adopt the Initial Decision. Following the motion, Ms. Salkind stated that retaining a position number "on the books" does not keep a position as it was, and Teigen's position clearly did not remain the same. Mr. Zakhem asked Board Counsel Forman about the impact of the Board's prior decision in *Clementi* and the Court of Appeals decision in *Rice and Wells v. Auraria Higher Education Center*, State Personnel Board case number 2002B092(C), Court of Appeals No. 04CA0086, Order Affirmed in Part, Reversed in Part, and Case Remanded with Directions (June 16, 2005), a recently published decision.

Mr. Forman advised the Board that as a matter of law, whatever decision it may make, the Board needs to interpret Board rules as such rules apply to layoff. Per paragraph 13 of the Initial Decision, layoff occurs at the time the decision to abolish a position is made. Board Rules R-7-9 and R-7-14. Another interpretation of the rules is that layoff only occurs with separation from employment, e.g. dismissal. However, "rights" occurred for Teigen as soon as the Department of Corrections made the decision to abolish his position. The question is whether DOC acted arbitrarily and capriciously. The ALJ concluded that: (1) the abolishment of Teigen's position was done wrongly; and (2) Teigen was treated arbitrarily and capriciously and was unable to exercise retention rights. Mr. Forman cautioned that the Board is bound by the ALJ's findings of facts but may apply a different determination of law. The Board rules and statutes don't specifically state that they apply to a decision to abolish a position.

Addressing the recent decision of *Rice and Wells*, Mr. Forman stated that the ALJ determined that Rice was treated arbitrarily and capriciously, as a new position was created with all the duties he formerly had, but the Board overturned this determination. Wells, on the other hand, had no rights to transfer. The Court of Appeals agreed with the ALJ, reversed the Board's decision on Rice, and upheld the ALJ on Wells. Mr. Djokic remarked that *Rice and Wells* gives guidance on layoff, separation from service, and position abolishment, stating that *Teigen* is somewhat similar but there are other facts in this case as to whether DOC was arbitrary and capricious, distinguishing it from *Clementi*.

Ms. Salkind stated that the Board should not define layoff in this context; Ms. Siderius read from Board Rule R-12-7, the definition of layoff: "Process of involuntarily separating an employee due to abolishment of the position for lack of work, lack of funds, reorganization, or displacement by another employee exercising retention rights." Mr. Zakhem stated that in Teigen's situation, his position was abolished, which led to separation from his position and the finding of another job, actions which were arbitrary and capricious and not appropriately handled. He asked the Board if it wanted to do a "bifurcated ruling," but Ms. Salkind expressed a desire to avoid defining layoff further.

Returning to Ms. Salkind's motion to adopt the Initial Decision of the Administrative Law Judge, Ms. Siderius seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Salkind, Ms. Siderius, and Mr. Zakhem.

Mr. Zakhem also raised the issue of Exhibit V, the "blacklist" e-mail memorandum from Nolin Renfrow to Wardens dated August 15, 2003, the names upon which closely parallel the Board's docket. He asked if there should be an inquiry or referral regarding the violation of rights of Colorado state employees as evidenced in the blacklist. Ms. Salkind stated that the blacklist will put a damper on employees filing appeals, and noted that she found DOC's briefs extremely offensive and arrogant, lacking both points of law and references to the record of the case. Ms. Siderius suggested a referral of the blacklist to the Executive Director of the Department of Personnel and Administration and a request for an investigation. Mr. Forman stated that such a referral/request would not be binding, but only in the spirit of the Board. Mr. Zakhem then inquired if the blacklist rises to the criminal conspiracy level to be investigated by the Colorado Bureau of Investigation. Mr. Forman replied in the negative, stating that there are other cases coming through the system and the Board needs to be careful not to reach final conclusions and there needs to be more investigation before the conclusion of criminal intent can be drawn. Mr. Zakhem stated that DOC needs to be accountable and that the Board wants a report from DOC to the Board. Mr. Forman stated that a record could be made, but the Board probably should not consider a report while other DOC layoff cases are pending. Ms. Siderius suggested that the matter be "bumped" up to Executive Director Wells, copying DOC. She also stated she is troubled by the briefs with no reference to the record and comments which were both personal and inappropriate; she then moved to refer the August 15, 2003 e-mail memorandum ("the blacklist") to DPA's Executive Director with the recommendation that an investigation be initiated and the Governor's office be copied. Ms. Salkind seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Salkind, Ms. Siderius, and Mr. Zakhem.

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING

- A. Benjamin Vialpando v. Department of Transportation, State Personnel Board case number 2005G002.

Mr. Zakhem declared a conflict in this matter, leaving only two Board members eligible to consider the case and vote. Therefore, the matter was tabled until the next meeting.

- B. LaVonne Taylor v. Department of Education, Colorado School for the Deaf and Blind, State Personnel Board case number 2004G029.

Ms. Siderius declared a conflict in this matter, leaving only two Board members eligible to consider the case and vote. Therefore, the matter was tabled until the next meeting.

- C. Victor Pochon v. Department of Human Services, Colorado Mental Health Institute at Fort Logan, Nursing Service Administration, State Personnel Board case number 2005G064.

Ms. Siderius moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Mr. Zakhem seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Salkind, Ms. Siderius, and Mr. Zakhem. Mr. Eid and Ms. Garcia were absent.

- D. Chanel Elaine Boyce-Dixon v. Department of Human Services, Colorado State Veterans Home at Fitzsimons, State Personnel Board case number 2005G055.

Ms. Siderius moved to adopt the Preliminary Recommendation of the Administrative Law Judge and grant the petition for hearing. Mr. Zakhem seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Salkind, Ms. Siderius, and Mr. Zakhem. Mr. Eid and Ms. Garcia were absent.

V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR

There were no Initial Decisions or other Final Orders of the Administrative Law Judges or the Director before the Board this month.

VI. REVIEW OF THE MINUTES FROM THE MAY 17, 2005 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

Ms. Siderius moved to approve the minutes of the May 17, 2005 meeting as submitted. Ms. Salkind seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Salkind, Ms. Siderius, and Mr. Zakhem.

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS MAY 17, 2005 PUBLIC MEETING:

- A. Department of Human Services, State and Veterans Home at Fitzsimons, State Personnel Board case number 2005R007.

The Board voted to deny the Request for a Residency Waiver for positions of Nursing Home Administrator (General Professional VII) and Director of Admissions (General Professional III) and voted to grant the Department of Human Services leave to file for reconsideration of its Request for Residency Waiver, if it would supplement its request with additional information including market data which demonstrated a systemic problem in filling these positions.

- B. Ken McCutcheon v. Department of Corrections, State Personnel Board case number 2005S009.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

- C. Lucille Dorsett v. Department of Military and Veterans Affairs, Division of Veterans Affairs, State Personnel Board case number 2005G048.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

VIII. REPORT OF THE STATE PERSONNEL DIRECTOR

There was no report of the State Personnel Director this month.

IX. ADMINISTRATIVE MATTERS & COMMENTS

- A. ADMINISTRATIVE MATTERS

- Cases on Appeal to the Board and to Appellate Courts
- *Stateline* - "State Personnel Board to Hold Election"

- B. OTHER BOARD BUSINESS

- Update on Legislation

Mr. Djokic stated that HB1339 had been signed by the Governor.

- Update on Office Move

Mr. Djokic stated that the move was completed.

- Selection of New Director

With regard to a new director, Mr. Djokic reported that interviews had been conducted, the candidates have been narrowed down, and an announcement of the new director is expected soon.

C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

John Deelman introduced himself and asked for information on the Board's website and the new telephone and facsimile numbers. He was referred to Ms. Sprague.

X. EXECUTIVE SESSION

A. Case Status Report

B. Minutes of the May 17, 2005 Executive Session

The meeting adjourned by consensus.

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APPROVED THIS 19th DAY OF JULY, 2005.

John Zakhem, Chair

Elizabeth Salkind, Member

Linda Siderius, Member